

CAUSE NO. _____

KENT SCHAFFER, § IN THE DISTRICT COURT OF
§
§ *Plaintiff,* §
§
v. § HARRIS COUNTY, TEXAS
§
§
DAVID BIRES §
§
§ *Defendant.* § _____ JUDICIAL DISTRICT

Plaintiff's Original Petition

To the Honorable State District Court Judge:

Plaintiff Kent Schaffer files this Original Petition complaining of and against Defendant David Bires and would show this Court as follows:

I. DISCOVERY CONTROL PLAN

1. Discovery in this case should be conducted under a Level 2 discovery control plan in accordance with Rule 190.3 of the Texas Rules of Civil Procedure.

II. PARTIES

2. Plaintiff Kent Schaffer is an individual who resides in Harris County, Texas.
3. Defendant David Bires is an individual who resides in Harris County, Texas who can be served with a copy of this Original Petition at 3714 Audobon Place, Houston, Texas 77006.

III. JURISDICTION

4. This Court has subject matter jurisdiction over this proceeding because the amount in controversy exceeds the minimum jurisdictional limits of this Court. David Bires is subject to personal jurisdiction in the State of Texas because he is a resident of Harris County,

Texas. Alternatively, the contractual agreements forming the basis of this lawsuit were performable, in whole or in part, in the State of Texas.

IV. VENUE

5. Venue is proper in Harris County, Texas because Harris County is the county in which all or a substantial part of the events or omissions giving rise to this claim occurred and Defendant was a resident of Harris County, Texas at the time this cause of action accrued. TEX. CIV. PRAC. & REM. CODE §§15.002(a), (b) (Vernon 2002).

V. BACKGROUND FACTS

6. This suit arises out of the parties' long-standing business relationship. Schaffer and Bires are attorneys. In 1988, the two started a law firm together under the name of Bires & Schaffer.

7. The parties never created a formal Texas entity for this business venture. Instead, during the duration of their business relationship, the parties' abided by general protocol established and agreed upon at the beginning of the business arrangement.

8. Schaffer and Bires agreed that the parties would operate their separate law practices in a joint office space but would split the cost of shared resources such as administrative support, rent, common spaces, and utilities ("Operating Expenses").

9. Profits and losses would not be shared among the parties. However, if the parties provided their office space to other attorneys in exchange for payment on a pro-rata basis, such Occupancy Income would be used toward the payment of the Operating Expenses.

10. The difference between Operating Expenses and Occupancy Income ("Net Expenses") would be split 50-50 between Schaffer and Bires on a monthly basis.

11. Based on this mutual understanding, on or around March 14, 2011, Schaffer and Bires, as the Tenant, co-signed a lease for the purpose of obtaining joint Office Space (the "Lease"). *See Exhibit A*, Lease. The Lease was subsequently amended after the parties elected to utilize the entire Additional Improvement Allowance.¹ *See Exhibit B*, First Amendment.

12. The Lease provides for an initial ten (10) year term and requires payment of monthly Base Rent as follows:

<u>Time Period</u>	<u>Annual Base Rent</u>	<u>Monthly Base Rent</u>
Months 1-24	\$173,875.08	\$14,489.59
Months 25-48	\$181,272.00	\$15,106.00
Months 49-72	\$188,669.04	\$15,722.42
Months 79-96	\$196,066.08	\$16,338.84
Months 97-120 ²	\$203,463.00	\$16,955.25

See Exhibit B, at ¶ 1.

13. Schaffer and Bires are jointly and severally liable for the obligations of the Lease. *See Exhibit A*, at ¶15.6.

14. After cosigning the Lease, the parties subsequently made portions of the Office Space available to other licensed lawyers to operate their separate law practices. These lawyers would make Occupancy Payments to the parties on a pro-rata basis based on their occupancy square footage.

15. Each month, Schaffer and Bires would calculate the Operating Expenses related to the entire Office Space, which included, among other things, rent, telephones, copiers, storage, administrative salaries/expenses, subscription services, and taxes.

¹ Any capitalized term not defined herein shall have the meaning ascribed to such term in the Lease.

² The natural Termination Date of the Lease is July 31, 2021.

16. Payments the parties received from individuals using the Office Space were credited toward the Operating Expenses and the remaining Net Expense was split 50-50 between Schaffer and Bires.

17. Every month, Schaffer and Bires each wrote a check to an office account for one-half of the Net Expenses. The Net Expenses, including Base Rent, were then paid from the office account.

18. However, on or around December 1, 2019, Bires communicated to Schaffer that he no longer wished to participate in this business arrangement and that he intended to abandon the Office Space. Bires did not seek the consent of Schaffer and Schaffer never provided such consent. On December 15 of 2018, Bires abandoned the Office Space.

19. For months after Bires' abandonment of the Office Space, and consistent with his obligation as a cosigner of the Lease, Bires continued to pay Schaffer his one-half portion of the Base Rent to the extent Schaffer was not able to recoup Bires' commitment via additional Occupancy Income. Several times after Bires abandoned the Office Space, he sent Schaffer a check for his percentage of the Base Rent. *See Exhibit C, Proof of Payment.*

20. Suddenly, in June of 2019, contrary to his conduct for the past eight years, Bires decided to unilaterally reduce the amount he would pay Schaffer. *See Exhibit C, at 6.*

21. Despite the fact that Schaffer has attempted to mitigate his damages by finding new occupants ("Additional Occupants"), Bires refuses to pay Schaffer an amount that would result in Schaffer's payment of only one-half of the Base Rent.

22. Bires, as co-signer to the Lease, is liable for one-half of the monthly Base Rent for the remainder of the Lease. To the extent Schaffer has received additional Occupancy Income based on his attempt to mitigate damages, Bires is required to pay Schaffer the difference between one-

half of the monthly Base Rent and the monthly Occupancy Income received from any Additional Occupants.

23. Despite his obligation to pay Schaffer \$6,992.83 for the month of June, Bires only paid \$1,575.61. As such, under the Lease and the parties' longstanding agreement, Bires owes Schaffer \$5,417.22 after applying Bires' partial payment.

VI. CAUSES OF ACTION

First Cause of Action: Breach of Implied and Oral Contract

24. Schaffer repeats and incorporates paragraphs 1 through 23.

25. An enforceable contract exists based on facts and circumstances that clearly indicate the parties had a mutual intention to split Base Rent 50-50.

26. For nearly eight years, since the parties entered into the Lease as cosigners, Bires has provided Schaffer a monthly check to cover his 50% share of the Net Expenses. Further, for five months after Bires abandoned the premises, *he continued to make payments to ensure that his obligation to pay 50% of Base Rent was met. See Exhibit C.*

27. The fact that the parties are co-signers of the Lease, coupled with Bires' longstanding and consistent practice of sending monthly checks to Schaffer in the amount of half the Net Expenses (including Base Rent), demonstrates the parties' mutual intention to split Base Rent during the term of the Lease.

28. As such, Schaffer and Bires entered into a valid and enforceable agreement to split Base Rent 50-50 during the term of the Lease.

29. Schaffer has fully performed his agreement by paying at least one-half of the Base Rent during each month of the Lease.

30. Bires, having refused to make payment of his one-half share of the Base Rent, is in breach of the agreement.

31. As a result of Bires' breach, Schaffer has suffered damages in the amount of \$5,417.22.

Second Cause of Action: Promissory Estoppel

32. Schaffer repeats and incorporates paragraphs 1 through 31.

33. Bires should be estopped from reneging on his promise to pay one-half of the Base Rent.

34. Bires promised to pay 50% of the Base Rent during the term of the Lease.

35. Bires should have foreseen that Schaffer would rely on this promise.

36. Schaffer reasonably and substantially relied on this promise to his detriment.

37. Injustice can be avoided only by enforcing Bires' promise.

VII. CONDITIONS PRECEDENT

38. All conditions precedent to Schaffer's claims for relief have been performed or have occurred or are legally excused.

VIII. ATTORNEYS' FEES

39. Schaffer repeats and incorporates paragraphs 1 through 38.

40. Schaffer is entitled to recover reasonable and necessary attorneys' fees pursuant to Chapter 38 of the Texas Civil Practice & Remedies Code.

VIII. RULE 194 REQUEST FOR DISCLOSURE

41. Pursuant to Texas Rules of Civil Procedure 194.2(a)-(l), Schaffer serves this Request for Disclosure on Defendant. Pursuant to Rule 194, the responding party must serve the written

response to the requesting party within thirty (30) days after service of these requests for disclosure.

IX. PRAYER

Plaintiff Kent Schaffer requests that this Court cite Defendant David Bires to answer this lawsuit and:

- a. Award Plaintiff actual damages in an amount to be proven at trial;
- b. Award Plaintiff's reasonable attorneys' fees, costs and expenses as authorized by law;
- c. Award Plaintiff prejudgment interest at the maximum rate allowable by law;
- d. Award Plaintiff post-judgment interest at the maximum rate allowable by law from the date of judgment until such judgment is paid in full;
- e. Award Plaintiff its costs of court;
- f. Award reasonable and necessary attorneys' fees in the amount of \$10,000 if this case is appealed to the court of appeals and \$15,000 if this case is appealed to the Texas Supreme Court; and
- g. Grant Plaintiff whatever other relief, whether at law or in equity, to which it is justly entitled to or that this Court deems proper.

Respectfully submitted,

BOYARMILLER

By: /s/ Lee A. Collins

Lee A. Collins

lcollins@boyarmiller.com

State Bar No. 00790484

Zach Kleiman

zkleiman@boyarmiller.com

State Bar No. 24106157

Kirby Grove

2925 Richmond Avenue, 14th Floor

Houston, Texas 77098

Telephone: (713) 850-7766

Facsimile: (713) 552-1758

ATTORNEYS FOR PLAINTIFF